IN THE COUNTY COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY,
FLORIDA

Case No.: 312019MM495

Assigned to David Morgan

State of Florida

vs.

Steven Brown
_____/

MOTION TO SUPPRESS

COMES NOW the Defendant, Steven Brown, buy and through his undersigned attorney of record, pursuant to Fla. Rule of Crim. Proc. §3.190(g)(1)(B), (D), and (E) and requests this Honorable Court enter an Order suppressing any and all evidence obtained as the result of an illegal search and seizure conducted in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. As grounds alleges the following:

1. The Defendant has been charged by Information with an alleged violation of F.S. §796.07(2)(f), Soliciting Prostitution.

2. The Defendant has been charged as the result of evidence obtained pursuant to the installation of video surveillance at the business "East Sea Spa" located at 13401 U.S. Highway 1, Sebastian, Florida 32958 in accord with the "Order for Surreptitious Entry and Installation of Electronic Surveillance Camera executed on November 11, 2018 and later extended on January 18, 2019.

3. The Orders for Surreptitious Entry and Installation of Electronic Surveillance Camera of November 11, 2018 and January 18, 2019 were executed based upon supporting affidavits which failed to provide the requisite probable cause to believe that a crime was or would be occurring in the business to be searched.

4. The video recording of the Defendant was obtained in violation of the Defendant's rights to personal privacy afforded by Article I, § 23 of the Florida Constitution, the Fourth

Amendment of the United States constitution and Article I § 12 of the Florida Constitution prohibiting illegal search and seizures.

5. The execution of the Orders for Surreptitious Entry and Installation of Electronic Surveillance cameras by the Indian River County Sheriff's Office were illegal as the Court Orders executed both on November 11, 2018 and January 18, 2019 permitted law enforcement to ONLY "**monitor**" the premises to be searched, not to "**record**" as requested in the applications. Although recording was specifically requested by law enforcement in their applications, the Court limited their authority and only granted law enforcement the ability to monitor video surveillance.

6. There existed no necessity for the installation of cameras. Law enforcement did not attempt or exhaust other normal investigative procedures. Surveillance was not shown to be necessary to achieve the investigative objectives. Mere speculations and "hunches" regarding "human trafficking" tainted the Application and mislead the Court. Law enforcement did not exhaust less-invasive investigatory techniques. While the Vero Beach Police Department deployed the use of an Undercover officer to enter a similar business in a related case, the Indian River County Sheriff's Office indicated this was impractical and otherwise not viable. Detective Finnegan also failed to conduct normal course investigatory work which would have eliminated the "need" for camera surveillance, i.e. spa employee and former employee interviews and undercover infiltration.

APPLICATION FOR SEARCH WARRANT ALLEGATION SUMMARY

7. According to the Affidavit and Application for Search Warrant submitted by Det. John Finnegan of the Indian River County Sheriff's Office, this investigation began as the result of a complaint filed by Karen Herzog of the State of Florida Department of Health and Investigative Services. The basis of the concern was that at her inspection, Ms. Herzog allegedly observed clothing, suitcases, food, undescribed "bedding", and "other indicators" consistent with someone living at the facility. It should be noted the spa passed inspection.

8. This information alone sparked law enforcement's surveillance of the premises. Law enforcement first noticed the business closing at "irregular" hours or within one hour of the advertised closing time. This notion is absurd in that any business that is based upon customer interaction through appointments, closes or stays open based upon the absence or presence of

customers. Certainly, it would not be "irregular" for a doctor, lawyer, dentist or chiropractor to remain open if a client or patient was present past scheduled hours.

9. Law enforcement next alleges the prior arrest of a spa employee, with no supporting criminal history record for the Court to review and alleged advertising by East Sea Spa based upon Google searches to support their case for probable cause. Law enforcement failed to provide the Court with any exhibits or actual records showing East Sea Spa was responsible for the advertising or placing its business on any particular website.

10. Once law enforcement began surveilling the business, they conducted two self-proclaimed "john stops." At best these individuals would be described as confidential informants with no record of proven reliability. Their identities have not been disclosed. There is no indication law enforcement had any prior contact with these men. Law enforcement failed to disclose whether any other stops were made wherein sexual activity was denied by other patrons of the spa. If other interviews existed, law enforcement intentional and recklessly omitted them and in doing so mislead the Court.

11. Finally, law enforcement describes the entry of an Undercover officer who entered the business to purchase a gift card. During this visit, although the officer never enters a room and saw no other patrons, he alleges to the Court that the business is operated using the standard "Asian Model." This generic assertion has no basis in fact. The affiant failed to provide the Court any field experience or training he has supporting this claim which generalizes the practices of an entire race of people purported to be involved in organized crime. It should be noted the Vero Beach Police Department used an Undercover officer posed as a patron, who infiltrated a spa and was allegedly solicited. This process was described as problematic and otherwise impossible without the commission of a crime by the Affiant in this case which apparently has no basis in accuracy.

EXECUTION OF THE WARRANT

12. Based upon the allegations submitted by Detective John Finnegan, Judge Cynthia Cox entered the Order authorizing the installation of electronic surveillance. This Order authorized law enforcement to "enter the premises to be searched video surveillance cameras, and to **monitor** these surveillance cameras for a period of no longer than 30 days, and forthwith make return of your doings upon executing this warrant, which you are hereby commanded to

execute as law directs within ten days from the date thereof. While ***monitoring*** the premises to be searched, the Sheriff shall take steps to minimize the invasion of privacy to any parties…"

The Warrants executed on December 11, 2018 and January 17, 2019 contained the above identical language. The Court simply authorized monitoring. Recording was conspicuously excluded from the actual warrant although it was requested throughout the Affidavit. Law enforcement was obliged to operate within the four corners and black and white language of the warrant. If this language was inadvertently omitted, it was the responsibility of law enforcement to attempt to correct or clarify the Order. No clarification or corrections were requested or made. Law enforcement exceeded the scope of their authority and operated outside boundaries of the warrant by recording when only monitoring was authorized.

13. Both Orders failed to properly minimize the invasion of privacy by not specifically establishing limitations or restrictions on who could be recorded, i.e. women, minors, elderly, disabled. The Orders failed to outline the length of time officers could monitor each patron and specifically who could monitor. In short, no procedures were set forth to protect innocent patrons from surreptitious monitoring and recording of their nudity and massages.

14. It appears law enforcement failed to comply with the 10-day return period on the warrant. In the warrant, the Court specifically Ordered as follows: "…make return of your doings upon executing this warrant, which you are hereby commanded to execute as law directs within ten days from the date thereof." This Order is in place to protect citizens from the unlawful invasion of privacy by monitoring the ongoing execution of its warrant. The Court was not afforded the ability to conduct its requisite oversight.

LEGAL ARGUMENT

15. Right to Privacy

Article I § 23 of the Florida Constitution provides all natural persons within Florida a heightened right to privacy than that referenced by several amendments to the United States Constitution. Specifically: "***Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.***" The Florida Supreme Court has recognized Florida's Constitutional Right to Privacy provides for greater protection than the U.S. Constitution in Winfield v. Div. of Pari-Mutel Wagering, 477 So.2d 544 (Fla. 1983) when it stated:

> **"The citizens of Florida opted for more protection from governmental intrusion when they approved Article I § 23 of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, § 23 was intentionally phrased in strong terms. The Drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative an enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the U.S. Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."**

The Defendant had a reasonable expectation of privacy in the massage room. There was no expectation he would be viewed by any person other than his masseuse. The Defendant would have expected that the shut doors and blinded windows would have provided privacy so as to undress and participate in a massage which in any setting would typically involve a person being nude or at least partially nude.

Florida courts have held that where Governmental action invades a citizen's legitimate expectation of privacy, it must be done in the "least intrusive manner possible." Caddy v. State, 764 So.2d 625 (1st DCA 2000). In this case, law enforcement failed to implement a number of investigative tools far less intrusive than video surveillance. Law enforcement attempted to outline the impracticality of sending in an undercover not knowing or ignoring the fact that a neighboring agency, the Vero Beach Police Department did just that in a related investigation which occurred during the same exact time period with cooperative authority and assistance with multiple agencies.

In United States v. Batiste, 2007 WL2412837 at 7 (S.D. Fla. Aug. 21, 2007) the Court held that video surveillance could not be constitutionally conducted…for anything but the most serious offenses." See Batiste, 2007 WL 2412837 at 7. In this case, cameras in the massage room continually recording for days on end could have only produced evidence of the low-level crime of engaging in prostitution. Evidence of "human trafficking" or more insidious criminal activity were not captured at any point on the video surveillance authorized by the warrants in this case.

16. Title III Standard

Delayed notification warrants or "sneak and peak" surveillance should be used as an investigatory tool of last resort. In United States v. Mesa-Rincon, 911 F.2d 1433, 1437 (10th Cir. 1990), a case actually cited in the Affidavit and Application for Search Warrant as persuasive authority, the 10th Circuit adopted five requirements for implementing video surveillance. The Court drew on three sources, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1988); the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11 (1982); and the common law concerning audio surveillance prior to the passage of Title III. See Mesa-Rincon, 911 F.2d at 1437.

The Court held the following: "An order permitting video surveillance shall not be issued unless: **(1)** there has been a showing that probable cause exists that a particular person is committing, has committed, or is about to commit a crime; **(2)** the order particularly describes the place to be searched and the things to be seized in accordance with the fourth amendment; **(3)** the order is sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation; **(4)** the judge issuing the order finds that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous; and **(5)** the order does not allow the period of interception to be longer than necessary to achieve the objective of the authorization, or in any event no longer than thirty days." Id. at 1437.

In the case-at-bar, **(1)** there was a lack of probable cause to believe a crime was committed or about to be committed. The preliminary investigation was based on generalizations, suppositions, and "hunches." **(2)** There was no particularity as to the identification of the persons to be searched. **(3)** There were no procedures or plans implementing minimization and as such minimization did not occur. There were no time constraints on the length of time to record or procedures or instructions provided to prevent the recording of persons not connected with criminal activity. **(4)** Again, no efforts to were made to employ tried and true alternative investigative techniques. There was no showing of necessity. As early as September, 2018 some 3-4 months prior to the Affidavit and Application for Search Warrant, law enforcement within Indian River County had used an Undercover officer to infiltrate a spa located within the jurisdiction of the Vero Beach Police Department. The very procedure which is alleged to be impractical and problematic were employed by cooperating agency within the jurisdiction of the

Indian River County Sheriff. This undercover was able to provide reconnaissance without himself violating the law. Additionally, officers could have applied for pen register warrants. **(5)** The period of intercept was longer than necessary to achieve the objective of the authorization. The application did not provide for periodic review by the Court to determine the success of the intercepts or the necessity of maintaining the surveillance past any particular day. There was no reasoning to substantiate the need for 5 days of monitoring versus 30 days. A short as possible window would have minimized the impact on the privacy rights of the customers of the spa and the Defendant.

WHEREFORE the above premises considered, the Defendant respectfully requests this Honorable Court enter an Order suppressing any and all evidence obtained as the result of an illegal search and seizure conducted in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

I hereby certify that a copy of the foregoing has been furnished to the Office of the State Attorney by Electronic service to SA19eService@sao19.org on April 2, 2019.

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